

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ALYSSA H.,

Plaintiff,

v.

Civil Action No.
3:20-cv-1506 (DEP)

KILOLO KIJAKAZI, Acting Commissioner
of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN GORTON LAW FIRM
P.O. Box 89
1500 East Main Street
Endicott, NY 13761-0089

PETER A. GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

CHRISTINE A. SAAD, ESQ.

¹ Plaintiff's complaint named Andrew M. Saul, in his official capacity as the Commissioner of Social Security, as the defendant. On July 12, 2021, Kilolo Kijakazi took office as the Acting Social Security Commissioner. She has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c), are cross-motions for judgment on the pleadings.² Oral argument was conducted in connection with those motions on July 13, 2022, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

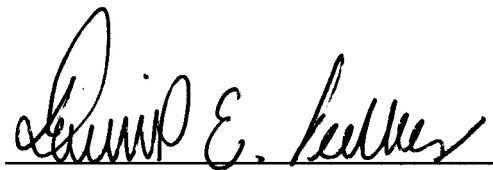
After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by

² This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: July 18, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
ALYSSA H.,

Plaintiff,

vs.

3:20-CV-1506

KILOLO KIJAKAZI, ACTING COMMISSIONER
OF SOCIAL SECURITY,

Defendant.
-----X

Transcript of a **Decision** held during a
Telephone Conference on July 13, 2022, the HONORABLE
DAVID E. PEEBLES, United States Magistrate Judge,
Presiding.

A P P E A R A N C E S

(By Telephone)

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1 (The Court and all counsel present by
2 telephone.)

3 THE COURT: Let me begin by thanking both counsel
4 for excellent spirited presentations.

5 Plaintiff has commenced this action pursuant to 42
6 United States Code Sections 405(g) and 1383(c)(3) to
7 challenge an adverse determination by the Acting Commissioner
8 of Social Security finding that she was not disabled at the
9 relevant times and therefore ineligible for the Title XVI
10 benefits which she sought.

11 The background is as follows: Plaintiff was born
12 in February of 1991 and is currently 31 years of age. She
13 was 27 years old at the alleged onset of disability which is
14 actually the date of her application for benefits of
15 March 19, 2018. Plaintiff stands 5 foot 1 inch in height and
16 has weighed between 117 and 130 pounds at various times.
17 Plaintiff lives in Johnson City with her mother, a son
18 together with the wife's son -- the wife's son's father, and
19 also with her sister. Plaintiff is right-handed. She
20 achieved a GED and attended regular classes while in school.
21 I note that the marital situation is fairly fuzzy, it's
22 unclear whether she and the son's father are married. They
23 live apart but cohabitate when the son is with the father.
24 Plaintiff does not have a driver's license. Plaintiff
25 stopped working in March of 2018 and actually, according to

1 page 31 of the administrative transcript, has not worked
2 since 2013. When she did work, she worked as a part-time
3 cashier in a restaurant, as a janitor, and as a grocery store
4 produce worker. According to page 231 of the administrative
5 transcript, she was fired from that position as a result of a
6 conflict with her boss.

7 Plaintiff does suffer from some relatively minor
8 physical impairments including tarsal tunnel syndrome, left
9 lower, for which she underwent release surgery in September
10 of 2018, fibromyalgia, and sleep apnea, although she does not
11 use a CPAP machine.

12 The issue really in this case surrounds her mental
13 condition. She has at various times been diagnosed as
14 suffering from depressive disorder, panic disorder without
15 agoraphobia, bipolar disorder, and cannabis disorder. In
16 March of 2017, she attempted suicide through overdose of
17 gabapentin and Klonopin and was hospitalized as a result of
18 that suicide attempt. There were also indications of
19 physical confrontations with her mother at or about that
20 time. Plaintiff has treated with various providers including
21 Endwell Family Physicians, Lourdes Primary Care, UHS
22 Rheumatology, Lourdes Center for Mental Health, UHS Mental
23 Health, and Family and Children's Society.

24 In terms of activities of daily living, plaintiff
25 does some cooking, child care, including dropping off and

1 picking up her son at the bus stop. She plays with her son,
2 she cleans, watches television, listens to the radio. She
3 can dress herself, she does not shop, instead relying on her
4 mother for that.

5 Procedurally, plaintiff applied for Title XVI
6 benefits on March 19, 2018. On page 150, she claims
7 disability based upon fibromyalgia, anxiety, depression, and
8 sleep apnea. A hearing was conducted on November 5, 2019 by
9 Administrative Law Judge Shawn Bozarth to address plaintiff's
10 application for benefits. ALJ Bozarth issued an unfavorable
11 decision on November 15, 2019. That became a final
12 determination of the agency on October 6, 2020 when the
13 Social Security Administration Appeals Council denied
14 plaintiff's request for review. This action was commenced on
15 December 8, 2020, and is timely.

16 In his decision, ALJ Bozarth applied the familiar
17 five-step sequential test for determining disability.

18 At step one he determined that plaintiff had not
19 engaged in substantial gainful activity since the date of her
20 application.

21 At step two he found that plaintiff suffers from
22 severe impairments that impose more than minimal limitations
23 on her ability to perform basic work functions, and
24 specifically fibromyalgia, depressive disorder, panic
25 disorder, cannabis disorder, sleep apnea, tarsal tunnel

1 syndrome, and bipolar disorder.

2 At step three, ALJ Bozarth concluded that
3 plaintiff's conditions do not meet or medically equal any of
4 the listed presumptively disabling conditions set forth in
5 the Commissioner's regulations, specifically considering
6 Listings 1.02, 12.04, and 12.06, as well as Social Security
7 Ruling 12-2p which addresses fibromyalgia.

8 After surveying the medical evidence in the record
9 and other evidence, ALJ Bozarth concluded that plaintiff
10 retains the residual functional capacity, or RFC, to perform
11 sedentary work as defined in the regulations, with additional
12 physical limitations not at issue in this case, as well as
13 the following mental limitations. The claimant is capable of
14 simple, routine, and repetitive tasks in low-stress jobs
15 which are jobs that are defined as goal-oriented and which do
16 not have an assembly line, piecework, or numerical production
17 quota pace, a job in which the individual is limited to
18 occasional decision making, occasional changes of workplace
19 setting, and occasional changes to workplace routine and a
20 job in which she has only occasional contact with
21 supervisors, coworkers, and customers. And based upon that
22 RFC, the administrative law judge determined, after
23 concluding at step four that plaintiff did not have any past
24 relevant work of sufficient duration or earnings to be
25 considered, concluded based upon the testimony of a

1 vocational expert that plaintiff is capable of performing
2 available work in the national economy, citing as
3 representative positions document preparer, lens inserter,
4 and final assembly.

5 As the parties are well aware, the court's function
6 in this case is to determine whether correct legal principles
7 were applied and substantial evidence supports the resulting
8 determination. As the Second Circuit noted in *Brault v.*
9 *Social Security Administration Commissioner*, 683 F.3d 443
10 from 2012, this is an extremely rigid -- Mr. Gorton, are you
11 there?

12 MR. GORTON: I am back, yes, somehow I got cut off,
13 I don't know if everybody else got cut off, but -- so I
14 called back.

15 THE COURT: All right. Well, I don't know where
16 you left off but I'll continue and you'll be receiving a
17 transcript of my determination.

18 MR. GORTON: It'll be fine, yeah.

19 THE COURT: So in *Brault*, the Second Circuit noted
20 that this is an extremely stringent standard, substantial
21 evidence being defined as such relevant evidence as a
22 reasonable mind would find sufficient to support a
23 conclusion. That is even more demanding than the clearly
24 erroneous standard. Significantly, the Circuit noted that
25 once the administrative law judge finds a fact, under this

1 deferential standard, the fact can be rejected only if a
2 reasonable fact finder would have to conclude otherwise.

3 In this case, plaintiff raises several contentions,
4 the focus being on plaintiff's mental condition. First, she
5 challenges the failure of the Appeals Council to consider
6 LCSW Kathleen Loftus' letter of April 28, 2020. Second, she
7 asserts that it was error committed in assessing plaintiff's
8 medical records and relying on his assessment for affixing
9 the RFC. Third, she challenges the weight assigned to
10 medical opinions issued by state agency consultant Dr. L.
11 Haus and Consultative Examiner Dr. Amanda Slowik. Fourth,
12 she challenges the social limitation as not supported, and
13 fifth, claims that the step five determination, which the
14 Commissioner bears the burden of proof of course, is flawed
15 based upon the hypothetical that is based upon a residual
16 functional capacity finding not supported by substantial
17 evidence.

18 The relevant period in this case of course is March
19 of 2018 to November 2019, although that does not necessarily
20 mean that records outside that date are wholly irrelevant.

21 Addressing the first argument, on April 28, 2020,
22 Therapist Kathleen M. Loftus issued a letter that is in the
23 record -- Mr. Gorton, are you there? Ms. Saad, are you
24 there?

25 MS. SAAD: I'm here, your Honor.

1 THE COURT: Let's wait a minute for Mr. Gorton to
2 call back. He should pay his phone bill.

3 MR. GORTON: I'm here, I'm here, I had it on mute,
4 I've been here.

5 THE COURT: It just sounded like somebody signed
6 off, but we'll continue.

7 MR. GORTON: It did, it sounded the same to me. I
8 was assuming that this time it was maybe the defendant's
9 attorney. But the first time, I didn't sign off by the way,
10 it just killed me, but this time I've been on, I just --
11 doggone it, I put it on mute so I don't disturb and then I
12 forget.

13 THE COURT: Okay.

14 MR. GORTON: But I'm here.

15 THE COURT: Maybe the court should pay its phone
16 bill. All right. So addressing Therapist Loftus' opinion,
17 in that letter, she states, "As a psychotherapist, part of my
18 job is to be an agent of change, a beacon of hope for my
19 patients. I believe we all have the ability to change and
20 heal with motivation and support. It's just not easy."
21 Significantly she states, "In my opinion, Ms. H.'s mental
22 illness makes it impossible to participate in activities that
23 most people would say are normal, including working, at this
24 point in her treatment."

25 The Social Security Administration Appeals Council

1 said the following with regard to that letter, this is at
2 page 2 of the administrative transcript. The letter of
3 Therapist Loftus, by the way, is at page 6. "You submitted a
4 letter from Kathleen Loftus, LCSW-R, Family and Children's
5 Society, dated April 28, 2020 (1 page). The administrative
6 law judge decided your case through November 5, 2019. This
7 additional evidence does not relate to the period at issue.
8 Therefore it does not affect the decision about whether you
9 were disabled beginning on or before November 15, 2019." To
10 be properly considered, of course, it is well accepted new
11 evidence must be new, obviously, material, and must relate to
12 the period before the ALJ's decision. *Lesterhuis v. Colvin*,
13 805 F.3d 83 from the Second Circuit, 2015.

14 I agree with plaintiff's counsel that the mere fact
15 that the letter postdates the administrative law judge's
16 decision by some six months, the mere fact alone does not
17 mean that it does not qualify as new evidence that must be
18 considered. *Williams v. Commissioner of Social Security*, 236
19 F.App'x 641 from the Second Circuit, 2007, and *Pollard v.*
20 *Halter*, 377 F.3d 183 from the Second Circuit, 2004. But
21 clearly, it must reflect in some way, shape, or form that it
22 relates to the period at issue. *Anna G. v. Commissioner of*
23 *Social Security*, 2021 WL 3721140, Western District of
24 New York, August 23, 2021.

25 Aside from the fact that the therapist began

1 treating the plaintiff in March of 2018, it does not on its
2 face say anything to indicate that it relates to the period
3 in question. So I do not believe it was error or would be
4 error not to consider this letter, and even if it was, I
5 believe the error was harmless because the sentence that I
6 read, beginning with, "In my opinion," in my view, speaks to
7 a matter reserved to the Commissioner, specifically whether
8 the plaintiff is capable of working.

9 Turning to the next argument, whether the residual
10 functional capacity is supported and specifically whether the
11 medical treatment notes were properly evaluated by the
12 administrative law judge. A claimant's RFC represents a
13 finding of the range of tasks she is capable of performing,
14 notwithstanding her impairments. Specifically it ordinarily
15 represents a maximum ability to perform sustained work
16 activities in an ordinary setting on a regular and continuing
17 basis, meaning eight hours a day for five days a week, or an
18 equivalent schedule. *Tankisi v. Commissioner of Social*
19 *Security*, 521 F.App'x 29 at 33, Second Circuit 2013. Of
20 course an RFC determination is informed by consideration of
21 all of the relevant and other medical evidence, all of the
22 other evidence, and must be supported by substantial
23 evidence.

24 In this case, the residual functional capacity is
25 fairly limited. Support for the RFC comes in the form of

1 treatment notes, although they are admittedly mixed. The
2 plaintiff, at pages 1 through 5 of her brief, has outlined
3 what she believes to be treatment records that support her
4 position. The defendant at pages 9 and 10 outlines many of
5 the same -- records from many of the same dates, and excerpts
6 that she believes supports her position. The administrative
7 law judge also relied on the opinions of Dr. Haus and
8 Dr. Slowik, as well as plaintiff's activities of daily
9 living. The crux is whether I can say that no reasonable
10 fact finder could find the RFC that the administrative law
11 judge did, based upon the evidence in the record. The
12 evidence is equivocal. There is something in it for both
13 sides, but I am unable to say that no reasonable fact finder
14 could have arrived at the same conclusion, based on the
15 evidence in the record.

16 The crux of this case really is in the evaluation
17 of medical opinions. This case of course was filed after
18 March of 2017, the application that is, and therefore is
19 subject to the new revised regulations that took effect at
20 that time. Under the new regulations, an ALJ does not defer
21 or give any specific evidentiary weight, including
22 controlling weight, to any medical opinions or prior
23 administrative medical findings, including those from a
24 claimant's medical sources, 20 C.F.R. Section 416.920c(a).
25 Instead, an ALJ must consider factors that are laid out in

1 the regulations. Among them, paramount are supportability
2 and consistency, although the other factors must be
3 considered. Under the regulations, the ALJ must articulate
4 how persuasive he found the medical opinion and explain how
5 he considered the supportability and consistency of the
6 opinions. The ALJ may, but is not required to, discuss the
7 other factors. 20 C.F.R. Section 416.920c(b).

8 In this case, the focus of the arguments are upon
9 the opinions of Dr. -- first of Dr. L. Haus, a state agency
10 consultant, who rendered an opinion on April 25, 2018, it
11 appears at Exhibit 1A, pages 52 to 66 of the administrative
12 transcript, and also at 410 to 411. In his opinion or her
13 opinion, Dr. Haus finds moderate limitations in many areas:
14 The ability to understand or remember detailed instructions,
15 the ability to carry out detailed instructions, the ability
16 to maintain attention and concentration for extended periods,
17 the ability to perform activities within a schedule, maintain
18 regular attendance and be punctual within customary
19 tolerances, the ability to work in coordination with or in
20 proximity to others without being distracted by them, the
21 ability to complete a normal workday and workweek without
22 interruptions from psychologically-based symptoms, and to
23 perform at a consistent pace without an unreasonable number
24 and length of rest periods, the ability to interact
25 appropriately with the general public, the ability to accept

1 instructions and respond appropriately to criticisms from
2 supervisors, the ability to respond appropriately to changes
3 in the work setting, the ability to travel in unfamiliar
4 places or use public transportation. In each of the
5 subdomains listed on the worksheet, when asked to explain in
6 narrative form the adaptation capacities and/or limitations,
7 the notation is made, "See below." In the mental RFC portion
8 of Dr. Haus' opinion, he or she recites what the medical
9 evidence shows and draws the conclusion, "Retains the mental
10 ability to complete simple work with occasional contact with
11 others. These findings complete the medical portion of the
12 disability determination." No explanation whatsoever as to
13 how he or she arrived at that conclusion, what the extent of
14 the limitations reflected in the worksheet was. In my view,
15 it is woefully lacking in explanation that would permit
16 meaningful review of Dr. Haus' opinion as to whether it's
17 supported. And so *Jeaninne C. v. Andrew M. Saul*, Docket
18 Number 19-CV-1176, civil action number, Docket Number 19, I
19 addressed a similarly deficient state agency consultant
20 opinion and ordered a remand for that reason, and I find that
21 it was error in this case because of the woeful deficiency.

22 In his decision, ALJ Bozarth found at page 20 that
23 Dr. Haus' opinion was significantly persuasive based on the
24 following: "The source has program knowledge. The doctor
25 provided a detailed supporting rationale," which he did not.

1 "And 3, this opinion is generally consistent with the
2 contemporaneous treatment notes, the claimant's reported
3 activities of daily living and her mental health treatment
4 course."

5 I do not find that that is a sufficient explanation
6 of the issue of either consistency or supportability. And I
7 note when relying on activities of daily living, the
8 plaintiff has fairly limited activities of daily living as
9 she reported to both Dr. Slowik and Dr. Jenouri and in my
10 view, what she is capable of doing in terms of activities of
11 daily living do not translate well into the ability to work
12 on a sustained basis in competitive employment and the ALJ
13 did not tell me otherwise as to how that bridge is gapped, or
14 that gap is bridged I guess is the correct term. She doesn't
15 take public transportation because of her anxiety, she
16 doesn't shop because of her anxiety, anxiety limits her from
17 leaving her house. She does care for her son and drop him
18 off at a nearby bus stop and pick him up, but in my view,
19 those don't necessarily translate well into competitive
20 employment capability. But the bottom line is, I don't
21 believe that the administrative law judge's analysis of
22 Dr. Haus permits meaningful judicial review. *Raymond M. v.*
23 *Commissioner of Social Security*, 2021 WL 706645 from the
24 Northern District of New York, it is February 22, 2021.
25 The -- in my view that error alone would warrant remand.

1 The second opinion at issue comes from Dr. Amanda
2 Slowik, it appears at pages 405 through 409, it was issued on
3 April 18, 2018. In her medical source statement, Dr. Slowik
4 finds, among other things, that claimant is limited in her
5 ability to interact adequately with supervisors, coworkers,
6 and the public to an extent that is described as moderately
7 to markedly. She also finds that the claimant is markedly
8 limited in her ability to sustain an ordinary routine and
9 regulate emotions, and concludes that these difficulties are
10 caused by distractibility, anxiety, and depression. In his
11 decision, ALJ Bozarth concluded that Dr. Slowik's opinion was
12 partially persuasive, finding that she has program knowledge,
13 was able to examine the claimant, but she -- he concluded
14 that the degree of severity assessed by this opinion is
15 greater than supported by claimant's activities of daily
16 living, I've already addressed that, and contemporaneous
17 treatment notes.

18 In my view, it's not sufficient, sufficiently
19 adequate to simply say it's in contemporaneous treatment
20 notes without further specificity. In my view, again,
21 Dr. Slowik, the administrative law judge's consideration of
22 Dr. Slowik's opinion is woefully deficient and does not
23 properly address supportability and consistency to an extent
24 that would permit meaningful review. I don't agree that the
25 opinion is vague, and I reject the Commissioner's argument

1 that was made in the brief but not pressed at -- acknowledge
2 that it was not pressed during argument, that Dr. Slowik's
3 opinion is not a medical opinion under the regulations that
4 are subject to the requirement of addressing supportability
5 and consistency. I've already said how I don't believe the
6 activities of daily living reflected, including in Dr. Slowik
7 and Dr. Jenouri's reports, show that plaintiff can work five
8 days a week eight hours a day. *Pamela P. v. Saul*, 2020 WL
9 2561106 from the Northern District of New York signed May 20,
10 2020, by my colleague Magistrate Judge Daniel J. Stewart, and
11 *Coyle v. Commissioner of Social Security*, 2018 WL 3559073
12 from the Northern District of New York, 2018, my colleague
13 Administrative Law Judge William Mitchell.

14 So I find error in the reliance on the activities
15 of daily living without specifying the relationship between
16 the ADLs relied on and plaintiff's ability to meet the mental
17 demands of competitive employment. I don't believe that the
18 ALJ's analysis of Dr. Slowik's opinion permits meaningful
19 judicial review. I find that the error is harmful because
20 Dr. Slowik's opinion is inconsistent with the RFC when it
21 comes to plaintiff's ability to maintain a schedule and stay
22 on task, and so I believe the matter should be remanded for
23 further consideration of the evidence. I do not find
24 persuasive proof of disability and therefore will order that
25 the Commissioner's determination be vacated and the matter be

1 remanded for further consideration.

2 Thank you both for excellent presentations, I hope
3 you have a good afternoon and the rest of your summer.

4 MR. GORTON: Thank you, your Honor.

5 MS. SAAD: Thank you, your Honor.

6 (Proceedings Adjourned, 2:58 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
pursuant to Section 753, Title 28, United States
Code, that the foregoing is a true and correct
transcript of the stenographically reported
proceedings held in the above-entitled matter and
that the transcript page format is in conformance
with the regulations of the Judicial Conference of
the United States.

Dated this 15th day of July, 2022.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter